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No. 76-440

In the Supreme Court of the United States

OCTOBER TERM, 1976

HYLAND, HALL AND COMPANY, GEORGE HALL and CLIFFORD REUSCHLEIN,

Appellants,

vs.

CITY OF MADISON, COUNTY OF DANE, and CITY OF MADISON acting as city school district known as JOINT SCHOOL DISTRICT NO. 8 OF THE CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWN OF MADISON and PARTS OF THE TOWNS OF FITCHBURG, BLOOMING GROVE, BURKE and WESTPORT, DANE COUNTY, WISCONSIN,

Appellees.

On Appeal from the Supreme Court of Wisconsin

JURISDICTIONAL STATEMENT

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INDEX TO JURISDICTIONAL STATEMENT

	PAGE
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Question Involved	4
Statement	5
The Question is Substantial	7
Appendix A—	
Opinion of Circuit Court for Dane County, Wisconsin	App. 1
Opinion of Supreme Court of Wisconsin	App. 14
Demurrer	App. 39
Notice of Appeal To Supreme Court of the United States	App. 41

INDEX TO CITATIONS

Constitutional Provisions

United States Constitution, Fourteenth Amendment ..4, 5, 8

Statutes Cited

133.01, Wisconsin Statutes of 1971	5, 9
133.01(1), Wisconsin Statutes of 1971	2, 5
133.01(3), Wisconsin Statutes of 1971	2
133.23, Wisconsin Statutes of 1971	3, *passim*

PAGE

United States Statutes Cited

Title 28, United States Code, §1257 ..... 7, 8

Title 28, United States Code, §1257(2) 2, 7

Title 28, United States Code, §1257(3) 2

Title 28, United States Code, §2103 2

Cases Cited

Bantam Books, Inc. v. Sullivan (1963) 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 2

Dahnke-Walker Milling Co. v. Bondurant (1921) 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 2

Garrity v. State of New Jersey (1967) 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 3

Local No. 438 Construction & General Laborers' Union AFL-CIO v. Curry (1963) 371 U.S. 542, 83 S.Ct. 531, 9 L.Ed.2d 514 3

Mercantile National Bank at Dallas v. Langdeau (1963) 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed.2d 523 2

Missouri Pacific Railway Company v. Tucker (1913) 230 U.S. 340, 33 S.Ct. 961, 57 L.Ed. 1507 8

Pope v. Atlantic Coast Line Railway Company (1953) 345 U.S. 379, 73 S.Ct. 749, 97 L.Ed. 1094 7

St. Louis, Iron Mountain & Southern Railway Company v. Williams (1919) 251 U.S. 63, 40 S.Ct. 71, 64 L.Ed. 139 6

Slagle v. State of Ohio (1961) 366 U.S. 259, 81 S.Ct. 1076, 6 L.Ed.2d 277 3

Southwestern Telephone and Telegraph Company v. Danaher (1915) 238 U.S. 482, 35 S.Ct. 886, 59 L.Ed. 1419 9

State v. Trailer Service, Inc. (1913) 61 Wis.2d 400, 212 N.W.2d 683 6

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO.

HYLAND, HALL AND COMPANY, GEORGE HALL and CLIFFORD REUSCHLEIN,

Appellants,

vs.

CITY OF MADISON, COUNTY OF DANE, and CITY OF MADISON acting as city school district known as JOINT SCHOOL DISTRICT NO. 8 OF THE CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWN OF MADISON and PARTS OF THE TOWNS OF FITCHBURG, BLOOMING GROVE, BURKE and WESTPORT, DANE COUNTY, WISCONSIN,

Appellees.

On Appeal from the Supreme Court of Wisconsin

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Wisconsin entered on June 30, 1976, affirming the Order of the Circuit Court for Dane County, Wisconsin, which overruled appellants' demurrer to the complaint against them, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Circuit Court for Dane County, Wisconsin overruling the appellants' demurrer to the complaint is unreported. The opinion of the Supreme Court of Wisconsin affirming that order is reported at 73 Wis. 2d 364 and 243 N.W.2d 422. A copy of the opinion of the Supreme Court of Wisconsin is attached hereto as Appendix A, pages 14-38.

JURISDICTION

On September 21, 1973, appellees commenced a civil antitrust action in the Circuit Court of Dane County, Wisconsin, alleging that appellants conspired to restrain competition on mechanical contracting projects in violation of §133.01(1) and (3), Wisconsin Statutes of 1971. The judgment of the Supreme Court of Wisconsin sought to be reviewed was entered on June 30, 1976, and notice of appeal was filed in that court on September 21, 1976, a copy of which is found after the demurrer in Appendix A, page App. 41. The jurisdiction of the Supreme Court of the United States to review this judgment by direct appeal is conferred by Title 28, United States Code, §1257(2). The jurisdiction of this court to review this judgment by writ of certiorari in the event that review by direct appeal is not appropriate, is conferred by Title 28, United States Code, §§1257(3) and 2103.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. *Dahnke-Walker Milling Co.* v. *Bondurant* (1921) 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239; *Mercantile National Bank at Dallas* v. *Langdeau* (1963) 371 U.S. 555, 83 S.Ct. 520, 9 L.Ed.2d 523; *Bantam Books, Inc.* v. *Sullivan* (1963) 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment by certiorari, in the event that direct appeal is not appropriate. *Slagle* v. *State of Ohio* (1961) 366 U.S. 259, 81 S.Ct. 1076, 6 L.Ed.2d 277; *Local No. 438 Construction & General Laborers' Union, AFL-CIO* v. *Curry* (1963) 371 U.S. 542, 83 S.Ct. 531, 9 L.Ed.2d 514; *Garrity* v. *State of New Jersey* (1967) 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562.

STATUTE INVOLVED

Section 133.23, Wisconsin Statutes, 1971, Volume 1, page 2297.

Ouster. If a complaint is made and evidence produced to the satisfaction of the attorney general that any corporation has violated s.133.21 or 133.22, the Department of Justice shall bring an action in the name of the state in any Circuit Court of the state to have the charter, or certificate of authority to transact business in this state, of such corporation forfeited, cancelled and annulled, and upon proof to the satisfaction of the courts, judgment shall be entered therefor. All contracts or agreements made by any person while a member of any combination, conspiracy, trust or pool prohibited by s. 133.01 or 133.21, and which contract or agreement is founded upon, or is the result of or grows out of, or is connected with, any violation of said sections, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom shall be had by or for any such person. Any payments made upon, under or pursuant to such contract or agreement to or for the benefit of such person, may be recovered in an action by the party making any such payments, his heirs, personal representatives or assigns; provided that suit for such recovery is brought within 6 years after the making of said contract or agreement.

QUESTION INVOLVED

Where a state statute allows plaintiffs-appellees to recover from mechanical contractor defendants-appellants all contract payments made on 103 construction projects from 1958 to 1969 which are founded upon, are the result of, grew out of or are connected with any trust or conspiracy in restraint of trade, and another state statute allows the plaintiffs-appellees to recover treble damages, is the state statute providing for recovery of contract payments unconstitutional on its face as violative of the Fourteenth Amendment to the United States Constitution in that it is flagrantly oppressive and disproportionate to the offense for which it is imposed, takes property of the defendants-appellants without just compensation, denies the defendants-appellants equal protection under the laws, and takes property from them without due process of law.

STATEMENT

On September 21, 1973, appellees commenced a civil antitrust action in the Circuit Court of Dane County, Wisconsin, alleging that the appellants were members of a conspiracy which fixed bids on plumbing, heating, ventilating and air conditioning contracts from about 1958 until at least 1969, in violation of §133.01 of the Wisconsin Statutes of 1971. Appellees prayed for two forms of relief: first, treble damages, under §133.01(1) of the Wisconsin Statutes of 1971, and second, the recovery of all contract payments (over $6 million) made to the appellants on contracts affected by the alleged conspiracy, under Section 133.23 of the Wisconsin Statutes of 1971. It is noteworthy that appellees seek to recoup their contract payments and yet retain the benefits of the contracts.

Seventeen defendants were originally named in appellees' suit, of which nine have been dismissed pursuant to settlement. Of the eight defendants remaining, three, Hyland, Hall and Company, George Hall, and Clifford Reuschlein, bring this appeal.

The above-named appellants demurred to appellees' Second Amended Complaint in the trial court on four grounds, one of which was that Section 133.23 is unconstitutional on its face as violative of the Fourteenth Amendment to the United States Constitution. A copy of the demurrer is included herein as Appendix A, pages App. 39-40. The Dane County Circuit Court, Honorable Robert F. Pfiffner presiding, issued an order, dated July 29, 1975, and entered July 31, 1975, overruling appellants' demurrer on three of the asserted grounds and deferring its ruling on the constitutionality of Section 133.23 of the Wisconsin Statutes of 1971 until trial. The relevant portion of the trial court decision is included herein as Appendix A, pages App. 1-13.

The appellants appealed the overruling of their demurrer to the Wisconsin Supreme Court, which affirmed the decision of the trial court; however, the Wisconsin Supreme Court held that Section 133.23 of the Wisconsin Statutes of 1971 was constitutional on its face. The Wisconsin Supreme Court's cited authority for its decision was *St. Louis, Iron Mountain & Southern Railway Company* v. *Williams* (1919) 251 U.S. 63, 40 S.Ct. 71, 64 L.Ed. 139, and *State* v. *Trailer Service, Inc.* (1973) 61 Wis.2d 400, 212 N.W.2d 683. The relevant portion of the Wisconsin Supreme Court opinion is found herein in Appendix A, pages App. 14-38.

THE QUESTION IS SUBSTANTIAL

The jurisdiction of the Supreme Court of the United States to review this judgment by direct appeal is conferred by Title 28, United States Code, §1257(2). A state court decision sought to be reviewed must be a "final" judgment. 28 U.S.C.A. §1257. The Wisconsin Supreme Court held §133.23 of Wisconsin Statutes constitutional in its face on an appeal from a demurrer.

Ordinarily, a judgment of the highest state court overruling a demurrer is not a "final" judgment, unless it appears that the demurrant has no other defense to interpose to the trial court. *Pope* v. *Atlantic Coast Line Railway Company* (1953) 345 U.S. 379, 73 S.Ct. 749, 97 L.Ed. 1094. In *Pope, supra,* the defendant sought an injunction restraining the plaintiff's suit against it under the Federal Employer's Liability Act. The plaintiff, on demurrer, argued that FELA barred such injunctive relief. The Supreme Court of Georgia overruled the demurrer, whereupon review was sought in the United States Supreme Court. The Court, in accepting the case, said that in view of the fact that the employe's federal (FELA) claim was the only defense asserted by him, the Georgia court judgment in effect determined the litigation, hence, it was "final".

Although here the appellants do have a defense on the merits to assert at trial against the allegation of a conspiracy to restrain trade, the court should take jurisdiction of this case on the principles enunciated in *Pope* v. *Atlantic Coast Line Railway Company, supra.* Appellants constructed projects exceeding $1 million in cost for appellees. A $1 million judgment against the appellants at the trial court level would ruin the appellants' business.

Bonding companies would soon learn of this judgment and would refuse to bond appellants as contractors. This penalty would soon put the appellants out of business and would deny them the right to pursue their occupation. Since the Wisconsin Supreme Court has already ruled the statute to be constitutional on its face, no real remedies would be available to appellants from the highest state court. By the time the appellants would be able to bring an appeal to the United States Supreme Court after adverse trial court and Wisconsin Supreme Court decisions, the appellants' credit and business would be destroyed by the adverse effects of the judgment. The appellants' right to appeal from an adverse trial court judgment would be meaningless, because appellants would be out of business. In effect, this is a final judgment of the highest court of the state on the constitutionality of a state statute whose application to appellants after trial would cause them irreparable harm. The constitutional question is ripe for adjudication when tested against the policy of 28 U.S.C. 1257.

The questions presented pose substantial federal questions. Section 133.23 of the Wisconsin Statutes contravenes the Fourteenth Amendment to the United States Constitution on its face in that it is flagrantly oppressive and disproportionate to the offense for which it is imposed, takes property of the appellants without just compensation, denies the appellants' protection under the laws, and takes property from them without due process of law. The statute allows the appellees to recoup their contract payments and yet reap the benefits of the contract. Section 133.23 is unconstitutional on its face since it violates the Fourteenth Amendment. *Missouri Pacific Railway Company* v. *Tucker* (1913) 230 U.S. 340, 33 S.Ct. 961, 57 L.Ed.

1507; *Southwestern Telephone and Telegraph Company* v. *Danaher* (1915) 238 U.S. 482, 35 S.Ct. 886, 59 L.Ed. 1419.

Further, §133.01, Wisconsin Statutes of 1971 allows the appellants to recover treble damages. It should be pointed out, however, that the question of the constitutionality of the double recovery is not an issue on appeal, since the Wisconsin Supreme Court declined to reach this question.

It is respectfully submitted that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

GEISLER & KAY
Robert J. Kay, Attorney for Appellants, Hyland, Hall & Company, George Hall and Clifford Reuschlein

APPENDIX

APPENDIX A

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

CITY OF MADISON, a domestic municipal corporation; COUNTY OF DANE, a domestic body politic and corporate; CITY OF MADISON acting as city school district known as JOINT SCHOOL DISTRICT NO. 8 OF THE CITY OF MADISON, VILLAGES OF MAPLE BLUFF and SHOREWOOD HILLS, TOWN OF MADISON, and PARTS OF THE TOWNS OF FITCHBURG, BLOOMING GROVE, BURKE and WESTPORT, DANE COUNTY, WISCONSIN, a domestic city school district,

Plaintiffs,

v.

C. A. HOOPER COMPANY, a domestic corporation, H. J. PERTZBORN PLUMBING AND HEATING CORPORATION, a domestic corporation, HYLAND HALL & COMPANY, a domestic corporation, W. O. ZIMMERMAN, INC. a domestic corporation, WELCH PLUMBING COMPANY, a domestic corporation, HERMAN O. HINRICHS, a/k/a H. O. HINRICHS, and HERMAN M. HINRICHS, individually and as partners doing business under the firm name and style of H. O. HINRICHS & SONS, CHARLES E. ARNOLD, JOHN R. CLARK, GEORGE HALL, ROBERT KILGUST, THOMAS F. MONTGOMERY, JAMES E. PERTZBONR, ROBERT P. PHARO, CLIFFORD REUSCHLEIN, RICHARD E. WELCH, and DAVID R. ZIMMERMAN,

Defendants.

DECISION ON DEMURRERS

All defendants demur to the plaintiffs' second amended complaint on various grounds. Prior to hearing the demurrers the defendants C. A. Hooper Company, John R. Clark, and Thomas F. Montgomery stipulated with plaintiffs for dismissal as to them and an order in accordance was entered on April 2, 1975. The grounds of demurrer will be treated under the following separate headings.

CAUSES OF ACTION IMPROPERLY UNITED

The plaintiffs' sue for relief alleging conspiracy in bid rigging on mechanical contracts under both Sec. 133.01 for treble damages and 133.23 to recover payments made on contracts. Defendants say that a separate cause of action is created by each statute and that since all causes of action did not affect all parties the complaint violates Sec. 263.04 stats. and is demurrable under Sec. 263.06(5) stats. This Court dealt with a similar claim on motions to make the second amended complaint more definite and certain, and by bench decision concluded that but one cause of action is created under both Sec. 133.01 and 133.23 with each providing for a different remedy. In arriving at that conclusion then, as now, the Court admittedly was and is influenced by the fact that to strike down joinder would result in a multiplicity of suits. Exhibit A of the complaint sets out some 103 contracts allegedly tainted with conspiracy which if defendants are correct would require for the most part separate suits under Sec. 133.23, at least insofar as each contractor is concerned. Then, too, the Court was influenced by the Wisconsin Rules of Civil Procedure effective January 1, 1976. Sec. 803.02(1) of the rules provides for joinder of as many claims whether legal or equitable a party asserting a claim for relief has against an opposing party, and Sec. 803.04(1) provides for permissive joinder of all persons in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

The second amended complaint alleges in Paragraphs 12, 13 and 14 a continuing conspiracy among defendants to monopolize the mechanical contracting business in Dane County, to submit collusive noncompetitive bids, bid rigging on mechanical work, and with respect to each project listed in Exhibit A of the complaint each defendant for the purpose of effectuating such combination and conspiracy did the things for which defendants combined and conspired to do (listing things allegedly done in furtherance of the unlawful conspiracy). Under the pleading all defendants are charged with conspiring in restraint of trade which if proven would make them jointly and severally liable for treble damages under Sec. 133.01 Michels v. Michels, 240 Wis. 539, and each defendant is alleged to be a co-conspirator with respect to all projects or contracts listed in Exhibit A. Thus the plaintiff will have to prove a conspiracy in restraint of trade among defendants to support any recovery whether under Sec. 133.01 or 133.23. The pleading is clearly adequate under the Rules of Procedure that will shortly become effective.

Aside from influence by the multiplicity aspect and the new Code of Civil Procedure, the Court felt and feels that under existing pleading law but one cause of action is pleaded. Sec. 133.01(1) provides in part:

> "Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. . . . Every combination,

conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the . . . price of any article or commodity in general use in this state . . . or which . . . shall in any manner control the price of any such article or commodity fix the price thereof . . . or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade. . . . Any such person, corporation, copartnership, trustee or association shall also be liable to any person transacting or doing business in this state for threefold the damages he may sustain by reason of the doing of anything forbidden by this section, and the cost of the suit including a reasonable attorney's fee. . . ."

Sec. 133.23 provides in part:

". . . All contracts or agreements made by any person while a member of any combination, conspiracy, trust or pool prohibited by Sec. 133.01 . . . and which contract or agreement is founded upon, or is the result of, or grows out of, or is connected with, any violation of said sections, either directly or indirectly, shall be void and no recovery thereon or benefit therefrom shall be had by or for any such person. Any payments made upon, under or pursuant to such contract or agreement to or for the benefit of such person, may be recovered in an action by the party making any such payment. . . ."

It would seem in examining these statutes if we adopt the "primary right" definition of cause of action or "grouping of facts falling into a single unit or occurrence as a lay person would view them" (Caygell v. Ipsen 27 Wis. 2d 578) definition that the gravamen of the cause of action whether brought for treble damages under Sec. 133.01, or the recovery of payments under Sec. 133.23 is the conpiracy in restraint of trade. Conspiracy in restraint must be shown before there can be any recovery of treble damages or any recovery of payments made which leads to the con-

clusion that the wrong is the conspiracy. Defendants say that recovery of payments under Sec. 133.23 sounds in contract, while conspiracy under Sec. 133.01 is a tort. True, Sec. 133.23 says a contract made as a result of an illegal conspiracy is void and that payments can be recovered. While "contract" is referred to nonetheless it is conspiracy that makes it void. So an action for recovery of payments is not a contract action as such, but a hybrid which requires proof of the tort before any recovery can be had. This leads the Court to the conclusion that but one cause of action is pleaded with different remedies being available under each statute and even if we conclude all parties are not affected by the same remedy the complaint is not demurrable on this ground. State v. P. Lorillard Co. 181 Wis. 347, State v. Golden Guernsey Dairy Cooperative 257 Wis. 254, Boerschinger v. Elkay Enterprises, Inc. 26 Wis. 2d 102.

CAPACITY TO SUE

The plaintiff City of Madison is a municipal corporation, and plaintiff Dane County a political subdivision of the State and a quasi municipal corporation. Defendants argue that while both plaintiffs are body politic they are not a "person" within the meaning of Sec. 133.01 stats. which provides that "any person, corporation, copartnership, trustee or association" which violates the substantive prohibitions of the statute in addition to criminal penalties "shall also be liable to any person transacting or doing business in this state for threefold the damages he may sustain by the doing of anything forbidden by this section, and the cost of suit including a reasonable attorney's fee." Sec. 133.04 stats. provides:

"The word 'person' whenever used in ss. 133.01 to 133.03 shall be deemed to include besides individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States."

And Sec. 990.001 provides that:

> "In the construction of Wisconsin laws the words and phrases which follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the Legislature.
>
> (26) 'Person' includes all partnerships, associations and bodies politic and corporate."

Defendants assert that had the legislature intended to include bodies politic as "persons," Sec. 133.04 would have spelled it out. They call attention to other statutes which specifically include bodies politic by language as being a "person" entitled to sue and urge the absence in Sec. 133.04 as indicating the manifest intent of the legislature not to permit suit against or by bodies politic under Sec. 133.01. They also point out that there was on the books at the time of passage of Sec. 133.04 the equivalent of Sec. 990.001(26) stats. (Sec. 4971 (12) stats. 1889) which buttresses their conclusion that by not enumerating bodies politic in Sec. 133.04 the legislature intended not to give the right to sue to such entities.

Plaintiffs point out that the City of Madison is a corporation, and Dane County at the least is a quasi municipal corporation, so that each fits the definition of person in Sec. 133.04. They argue a different result should attain than urged by the defendants based upon legislative history. Then, too, they point out that Sec. 133.01 is a reenactment of the first two sections of the federal Sherman Antitrust Act, with application to intrastate as distinguished from interstate transactions, with its construction to be ruled by federal decisions construing the federal statute—(State ex rel. Nordell v. Kinney 62 Wis. 2d 558) and that the U.S. Supreme Court in Georgia v. Evans 316 U.S. 159 held that a state was a "person" with standing to sue for treble damages under the Sherman Act; and in Chattanooga Foundry and Pipe Works v. Atlanta 203 U.S. 390 held that a city was a "person" within the meaning of Sec. 7 of the Sherman Act by the express provision of Sec. 8 of the Act, that is, a city was a corporation and thus a person under the federal statute.

Defendants point out the difference in language between the federal and state acts, but the difference in language does not dictate a conclusion that municipal corporations, quasi municipal corporations, and/or bodies politic are not persons under Sec. 133.04. I find plaintiffs' position more persuasive as there is no reason for the legislature to have decided that business corporations and all other persons have capacity to sue for treble damages while cities, counties or the state have no such capacity. Cities and counties are corporations and within the perview of Sec. 133.04, and if not, they are included under Sec. 990.001 (26) stats. as there is no manifest intent not to include them shown from the legislative history or the statutes themselves.

At the request of the Attorney General the Committee on Judiciary and Insurance introduced Senate Bill 595 (1973) which would have created Sec. 133.01(4) specifically granting the right to sue for treble damages to cities, counties and the state. The bill did not pass the legislature but I cannot conclude that the failure had any bearing upon the intent of the legislature that initially enacted Wisconsin's Little Sherman Act. The action of the Attorney General is an indication that the argument made here could be made, but other than that is not controlling.

Defendants also maintain that even though plaintiffs are held to be "persons" with capacity to sue, they are not "a person transacting or doing business in this state" within the meaning of Sec. 133.01. Paragraph 7 of the

complaint alleges that "each plaintiff transacts and does business in the State of Wisconsin and at all material times transacted and did business in the State of Wisconsin."

The federal statute provides that "Any person who shall be injured in his business or property" shall recover threefold damages by him sustained. Sherman Act Sec. 7, 26 stats. 210 (1890) repealed eff. January 7, 1956, 69 stat. 283 (1955). Wisconsin's Little Sherman Act was enacted in 1893 and the first section stated "Every contract or combination, in the nature of a trust or conspiracy in restraint of trade or commerce, is hereby declared illegal." Laws 1893 ch. 219 Sec. 1. It went on and provided "Any person transacting or doing business within this state who shall be injured in his business or property by any other person or corporation, by reason of anything forbidden or declared to be unlawful by this act may recover damages by him sustained, and costs of the suit." Laws 1893 ch. 219 Sec. 5. The requirement that plaintiff be "injured in his business or property" was dropped from the statute when the antitrust statutes were codified in 1898. 1898 stats. Sec. 1747(e). Defendants urge that since the federal statute contains the language "injured in his business or property" and the Wisconsin statute does not, the federal statute is broader and by the dropping of such phrase from the Wisconsin Act the legislature intended the Wisconsin statute to be narrower. The thrust of the argument is that the phrase "transacting or doing business in this state" in our statute requires a commercial enterprise of some sort or a business for profit, and since cities and counties do not do business in that sense they have no capacity to sue for treble damages.

This Court doubts that the elimination of the phrase "injured in his business or property" by the enactment of Sec. 1747(e) 1898 stats. was an expression of intent to make the statute more restrictive and in contrasting the interstate requirements under the federal act with the intrastate aspect of the Wisconsin statute it is no large step to conclude that the phrase "transacting or doing business in this state" was a legislative expression that minimal contacts with the state in intrastate commerce must be had to invoke the protection of 133.01 and was not an expression of intent to limit capacity to sue for treble damages to only persons doing business in a commercial or profit motive sense. Cities and counties do transact and do do business in the state within the statutory requirement.

Admittedly the plaintiffs have capacity to sue under Sec. 133.23 stats. Defendants do not assert otherwise. Since this Court has held that but one cause of action is pleaded, the demurrer on capacity ground can be denied since there can be no demurrer to a part of a cause of action. Rather than to summarily conclude this, however, the Court felt it should touch on the capacity arguments. Plaintiffs do have capacity to sue.

Lastly, defendants say that Joint School District #8 is not an entity entitled to sue. No doubt exists that a school district such as this one has no capacity to sue. Here, however, suit is by the City of Madison acting as city school district known as Joint School District #8 of the City of Madison, etc. It is clear that the caption of the summons and complaint names the City of Madison as the plaintiff, but acting as the school district. This contention of defendants fails, also.

FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION

Defendants first urge this ground under Sec. 133.01 because it is not alleged that any plaintiff has sustained any injury to its business for which it may recover damages. The Court will not repeat what it said under the capacity grounds, but suffice to say the complaint alleges each plaintiff did and does business in the state and that they sustained an injury by fixing or rigging bids and in other ways.

Next the claim is that because Sec. 133.23 was enacted after Sec. 133.01 that the later statutory remedy supersedes the former. The recovery of payments statute Sec. 133.23 was enacted in 1917. The treble damage recovery provided by Sec. 133.01 was enacted by the laws of 1957 ch. 397. Before 1957 only actual damage could be had. It is therefore apparent that the treble damage provision came after Sec. 133.23 was enacted. More bothersome is the claim that it is impossible to harmonize the remedy for treble damages and recovery of payments, but they can be harmonized. Any recovery for treble damages under Sec. 133.01 can be deducted from recovery of payments under Sec. 133.23. It may be upon further look that the plaintiffs ought be required to elect. One might wonder why a person would sue for treble damages and, also, to recover payments. It is not difficult to conclude that with an uncollectable defendant to whom payments were made it would be and is nice to rely on treble damages from all conspirators who are jointly and severally liable and perhaps with some financial responsibility.

Under this heading defendants say that because plaintiffs seek to recover payments under Sec. 133.23 from persons who are not alleged to have themselves received the payments the complaint fails to state sufficient facts to

constitute a cause of action. Again if the Court is correct in concluding that the plaintiff alleges but one cause of action this argument of defendants' becomes moot, but the Court feels it ought to deal with it even though because of its prior conclusion that one cause of action is pleaded it is superfluous. Plaintiffs put forth an ingenious argument that supports their conclusion that all conspirators are jointly and severally liable for payments made. They say that when Sec. 133.23 provides that payments made pursuant to contract "to or for the benefit of such person" may be recovered, it recreates a joint and several liability because any payment made to a contracting conspirator is for the benefit of all conspirators. While tempting bait this construction cannot be adopted. The statute says all contracts "made while a member of a conspiracy" shall be void and no recovery thereon shall be had by or for such person (contracting conspirator). It goes on and says any payments made upon such contract may be recovered by the party making any such payment. Finally, that action must be brought within six years after the making of said contract. When read in its entirety Sec. 133.23 can only mean that payments can be recovered from the person (contracting contractor here) to whom or for whose benefit payment was made.

The last argument posed under this heading is that Sec. 133.23 is unconstitutional and deprives defendants of due process of law insofar as it operates to exact excessive and duplicitous payments. As previously pointed out, there need not be duplication. Treble damages, if recovered, could be deducted from payments made. Plaintiffs, as pointed out previously, might also be required to elect which remedy they seek against the several defendants. Plaintiffs do not claim that they are entitled to double recovery. Furthermore, while constitutional issues can be raised by demurrer, the Court probably should and

does defer decision until after facts are developed on trial that might put the issue in better perspective. State v. Texaco, Inc. 14 Wis. 2d 624.

STATUTE OF LIMITATIONS

Paragraph 12 of the complaint alleges "on information and belief, beginning in about the year 1958, and continuing thereafter until at least the year 1969, the exact dates being unknown to the plaintiffs, in Dane County, the defendants engaged in an unlawful combination in the nature of a conspiracy in restraint of trade in commerce."

Paragraph 16 alleges facts that might satisfy the federal tolling of the Statute of Limitations doctrine, and Paragraph 17 facts that plaintiffs assert are sufficient to bring them within the estoppel doctrine as announced by the Wisconsin Court as it applies to the running of the Statute of Limitations.

Paragraph 12 of the complaint can be construed as putting a definite date on the end of the conspiracy, that is sometime in 1969, yet the language "the exact dates being unknown" can be construed to extend the 1969 date if facts are later developed to show its continuance after 1969. Clearly the complaint must unequivocally allege dates in order that the limitations ground of demurrer can be asserted successfully. This complaint does not do so, it must be construed liberally on demurrer, and on its face does not show the lapse of three years between the end of the conspiracy and the commencement of the action if the three-year statute of limitations applies to the recovery of treble damages under Sec. 133.01.

The federal doctrine of tolling the statute of limitations has never to this time as far as this Court can determine been adopted and, in fact, has not been recognized in Wisconsin. Peters v. Kell 12 Wis. 2d 32.

Wisconsin does recognize that a defendant may be estopped from asserting the defense of the statute of limitations. Boehm v. Wheeler 65 Wis. 2d 668. The Court is hesitant to deprive plaintiffs of proving facts that might be sufficient to establish estoppel if it has to be established to have the vitality of the action under Sec. 133.01 assuming that the cutoff date was 1969. The facts alleged to establish estoppel are sufficient under the pleading to allow proof to come forward so that the entire issue of limitations can be laid on the table and decided.

Demurrers of the defendants on all grounds must be overruled. No costs of motion. Defendants to have 20 days to answer. Attorneys for plaintiffs to prepare an order in accordance with this decision for signature of the Court.

Dated July 17, 1975.

By The Court:

/s/ Robert F. Pfiffner
Circuit Judge

No. 75-319
August Term, 1975

STATE OF WISCONSIN : IN SUPREME COURT

CITY OF MADISON, COUNTY OF DANE and CITY OF MADISON acting as city school district known as JOINT SCHOOL DISTRICT NO. 8 OF THE CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWN OF MADISON, and PARTS OF THE TOWNS OF FITCHBURG, BLOOMING GROVE, BURKE and WESTPORT, DANE COUNTY, WISCONSIN,

Respondents,

v.

HYLAND, HALL AND COMPANY, GEORGE HALL and CLIFFORD REUSCHLEIN,

Appellants.

APPEAL from an order of the circuit court for Dane county: ROBERT F. PFIFFNER, Circuit Judge.
Affirmed.

HEFFERNAN, J. This is an appeal from an order of July 31, 1975, overruling a demurrer to the complaint. The principal question raised on appeal is whether cities and counties have standing to sue for treble damages under the Wisconsin antitrust act. We conclude that they do, and affirm the order.

A civil antitrust action was commenced by plaintiffs on September 21, 1973. The City of Madison and Dane County charge the defendants with fixing bids on plumbing,

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[1] A criminal case concerning this alleged conspiracy was before this court in *State* v. *Hall* (1974), 65 Wis. 2d 18, 221 N.W. 2d 806.

heating, ventilating, and air-conditioning contracts, in violation of ch. 133, Stats.[1] Under ch. 133, the City of Madison and Dane County now pursue two civil remedies for the alleged conspiracy. They demand treble damages under sec. 133.01; and, pursuant to sec. 133.23, they seek recovery of payments on various contracts made with the defendants. Madison sues in its capacity as a city and as a school district. Seventeen defendants were originally named, but some have been dismissed pursuant to settlements. Eight defendants remain. Three defendants bring this appeal.

Plaintiffs' second amended complaint alleges that a continuing conspiracy, beginning about 1958 and continuing until at least 1969, existed among all the defendants to restrain and prevent competition in the supply and price of mechanical construction, and that, pursuant to such conspiracy, the defendants allegedly submitted collusive bids on mechanical work. The complaint alleges that each of the defendants was a member of the conspiracy and that each defendant, while a member of the conspiracy, entered into contracts with the plaintiffs with respect to some 103 projects listed in Exhibit A, appended to the complaint, which contracts were founded upon and connected with the conspiracy. Exhibit A indicates the particular plaintiff for which each specific construction contract was performed, the particular defendant corporation or partnership which performed the construction services, the name of the project, and the total payments made by the specific plaintiff to the specific contractor.

Defendants demurred to the second amended complaint on the following grounds: (1) Plaintiffs have no standing to sue for treble damages under sec. 133.01, Stats.; (2) plaintiffs improperly united several causes of action in their second amended complaint; (3) the claims set forth in the second amended complaint are barred by the appli-

cable statute of limitations; and (4) sec. 133.23 is unconstitutional on its face. The trial court overruled the demurrer as to the first three grounds asserted and deferred its ruling on the fourth until trial.

Defendants contend that neither the City of Madison nor Dane County has standing to assert a claim for treble damages under sec. 133.01, Stats. This is a question of first impression in this state.

The relevant statutory language in sec. 133.01 (1), Stats., arguably permitting the recovery of treble damages, is:

> "133.01 Unlawful contracts; conspiracies. (1) . . . Any such person, corporation, copartnership, trustee or association shall also be liable to any person transacting or doing business in this state for threefold the damages he may sustain by reason of the doing of anything forbidden by this section, and the cost of suit including a reasonable attorney's fee. . . ."

Sec. 133.04, Stats., defines "person" as follows:

> "133.04 What organizations included. The word 'person' wherever used in ss. 133.01 to 133.03 shall be deemed to include, besides individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States, any of the territories, of this or any other state or of any foreign country. . . ."

Sec. 990.01 (26), Stats., also defines "person":

> "990.01 Construction of laws; words and phrases. . . . In the construction of Wisconsin laws the words and phrases which follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the legislature:
>
> "(26) Person. 'Person' includes all partnerships, associations and bodies politic and corporate."

Defendants argue that the city and county are not "persons" within the meaning of either sec. 133.04, Stats., or sec. 990.01 (26), and that, even if they were, they are not "transacting or doing business in this state" within the meaning of sec. 133.01.[2] We disagree.

Because sec. 133.04, Stats., specifically relates to actions brought under sec. 133.01, it controls over any inconsistent definition of "person" found elsewhere in the statutes. *Schlosser* v. *Allis-Chalmers Corp.* (1974), 65 Wis. 2d 153, 222 N.W. 2d 156. However, statutes relating to the same subject matter should be harmonized if possible. *Weiss* v. *Holman* (1973), 58 Wis. 2d 608, 619, 207 N.W. 2d 660.

By statute, the City of Madison is "a body corporate and politic, with powers and privileges of a municipal corporation at common law and conferred by these statutes." Sec. 66.019, Stats. This court has repeatedly held that a city is a municipal corporation. *Columbia County* v. *Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 317, 116 N.W. 2d 142; *Madison Metropolitan Sewerage Dist.* v. *Committee on Water Pollution* (1951), 260 Wis. 229, 50 N.W. 2d 424. A city is a "body politic and corporate." *State ex rel. Poole* v. *Menomonee Falls* (1972), 55 Wis. 2d 555, 561, 200 N.W. 2d 580.

Sec. 59.01 (1), Stats., refers to counties as bodies corporate, and this court has so held in *State ex rel. City of Shawano* v. *Engel* (1920), 171 Wis. 299, 177 N.W. 33. While a county is not, strictly speaking, a municipal corporation, this court has held that it is a "*quasi*-municipal corporation" (*Engel, supra,* p. 304; *Columbia, supra,* p. 317), with

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[2] Defendants concede that the city and county may sue under sec. 133.23, Stats., for recovery of contract payments.

many of the attributes of a municipal corporation (*Madison Metropolitan Sewerage Dist., supra*).[3]

Under sec. 990.01 (26), Stats., it would appear that both cities and counties are "bodies politic and corporate" and are, therefore, "persons" within the meaning of that statute. While the statutes do not specifically state that a county is a body politic, this court has noted that a county, like a city, is a body politic. *Douglas County* v. *Industrial Comm.* (1957), 275 Wis. 309, 81 N.W. 2d 807; *Columbia, supra; Kyncl* v. *Kenosha County* (1968), 37 Wis. 2d 547; 155 N.W. 2d 583.

There is, then, no contradiction between secs. 133.04 and 990.01 (26), Stats. Reading these two sections together, we conclude that cities and counties are "corporations" within the meaning of sec. 133.04 and "bodies politic and corporate" within the meaning of sec. 990.01 (26). Thus, the City of Madison and Dane County are "persons" within the meaning of sec. 133.01, Stats., and are entitled to sue for treble damages.

Since we conclude that, under the consistent interpretations of this court holding that cities and counties are persons under the law and are, hence, entitled to use the treble-damages remedy of sec. 133.01, Stats., it is perhaps superfluous to further consider the statutory interpretations which lead to the same result. We will, however, briefly address the arguments raised by defendants.

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[3] This court held that a county is subject to the joinder-of-defendants statute, sec. 260.11 (1), Stats., which allows joinder of any "person . . . who has . . . an interest in the controversy adverse to plaintiff." *Anderson* v. *Green Bay Hockey, Inc.* (1973), 56 Wis. 2d 763, 771, 203 N.W. 2d 79.

Defendants argue that this court very recently in *State ex rel. Department of Public Instruction* v. *Department of Industry, Labor and Human Relations* (1975), 68 Wis. 2d 677, 229 N.W. 2d 591, held that the state and its political subdivisions are bodies politic but not corporate and therefore not within the definition of "person" in sec. 990.01 (26), Stats., or within the definition of "person" as used in sec. 133.04. The defendants misread that case. That case was concerned only with the status of the state itself and agencies that are the direct administrative arms of the state. The case did not deal with governmental entities such as cities and counties.

The state, of course, is the sovereign, deriving its rights from the people; and it is the body politic which has the power to create corporations, either private or public. Cities and counties are, however, the creatures of the state's incorporation power; and, by the interpretations of this court, cities and counties are, respectively, municipal corporations or quasi-municipal corporations. They, furthermore, are bodies politic under sec. 990.01 (26), Stats. *State ex rel. Department of Public Instruction* v. *Department of Industry, Labor and Human Relations, supra,* supports, rather than contradicts, the corporate status of cities and counties.

The defendants also rely on the legislature's failure to pass bills in 1973 and 1975 which would have specifically permitted a county or a municipality to sue for treble damages in state antitrust actions. Had this court previously determined that counties or cities did not have standing to sue for treble damages, the failure of the legislature to enact a law to overturn such decision would be relevant to the question of the legislature's acquiescence in a prior holding. Such prior holding, however, has never been made by this court.

The nonaction of the legislature in failing to expressly provide for treble damages in a case such as this cannot be construed as an expression of legislative intent that cities and counties ought not have that remedy or that they do not presently possess such remedy under the existing statutes. The most that can be gleaned from these abortive attempts at amending the statute is the desire of some legislators to express with greater clarity than does the present statute the right of these municipalities to be afforded the treble-damages remedy. Such doubts of the present effect of the law have no bearing upon our interpretation under the clear guidelines of the Wisconsin law. They are irrelevant to the legislature's intention when the Wisconsin antitrust law was enacted in 1893.

The defendants also argue that treble damages are tantamount to a statutory penalty, are penal in nature, and, therefore, must be construed strictly. From this, they would have us conclude that municipalities, which are not expressly included in the act, cannot by extraneous definition or decisional law be included in the category of "persons." The statute is indeed in part penal in nature. *State ex rel. Nordell* v. *Kinney* (1974), 62 Wis. 2d 558, 215 N.W. 2d 405. The statute, however, is remedial in nature in that it seeks to preserve our free enterprise system. As Justice Marshall stated in the case of *Hawaii* v. *Standard Oil Co.* (1972), 405 U.S. 251, 262, 92 Sup. Ct. 885, 31 L. Ed. 2d 184:

> "Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. . . . This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation."

It is apparent that the purpose of the statutes transcends the object of merely penalizing particular violators. Under the scheme of things, the antitrust laws have the affirmative purpose of preserving the economic vitality of the nation and of the state. We need not dwell on the specific evils that the antitrust laws sought to curb. It is apparent that antitrust laws are remedial in nature as well as penal. Under the accepted law of Wisconsin and of other jurisdictions, remedial statutes should be liberally construed "to suppress the mischief and advance the remedy which [the statute] intended to afford." *Stone* v. *Inter-State Exchange* (1930), 200 Wis. 585, 589, 229 N.W. 26; *Schnabl* v. *Ford Motor Co.* (1972), 54 Wis. 2d 345, 352, 195 N.W. 2d 602, 198 N.W. 2d 161.

Where statutes are both penal and remedial, courts separate the penal provisions from the remedial, giving the provisions establishing penalties strict construction and the remainder of the act a liberal construction. Sutherland, 3 *Statutory Construction,* sec. 60.04, p. 35.

Here, the remedial and punitive damages are included in the same penalty. The proper construction of these circumstances, according to Sutherland, *supra,* is to give liberal construction to the penalties which are inherent to the remedial aspects of the act, but to strictly construe the provisions creating the wrong. To reach the conclusion we do, we need not construe the statute liberally. We merely give the penalties the *literal* meaning set forth in the statute.

Since both treble and actual damages are integral to the remedial aspects of the act, the right to their enforcement by cities and counties should be liberally construed, while the aspects of the alleged conduct which gives rise to these remedies should be construed strictly.

The defendants also argue that, if this court construes cities and counties as persons having standing to pursue treble-damage remedies as plaintiffs, then they would be liable to such suits as defendants under sec. 133.01, Stats. The short answer to that is, why should they not be subject to such liabilities if they or other persons combine to restrain trade.

The defendants' position seems basically that, if cities and counties could be liable, then so could the state. We have previously referred to the very real difference between the state and its instrumentalities, which we classify as bodies politic and corporate and which are persons under the law. As we stated above, the state is a sovereign and cannot be sued without its consent, while the immunity conferred upon municipalities derives, not from their sovereign status—for they have none—but from considerations of public policy, which were once subsumed under the doctrine of municipal immunity. The doctrine of municipal immunity has been abrogated by this court. *Holytz* v. *Milwaukee* (1962), 17 Wis. 2d 26, 115 N.W. 2d 618.

Accordingly, the rule that the state is not to be considered within the purview of a regulatory statute of general application is not involved in the case before us. Nor do we decide in this action that municipalities are subject to treble-damage judgments. The question is not presented.

Wisconsin's antitrust act was modeled after the Sherman Act of the United States. The definition of "person" in the Wisconsin act is essentially the same as that in the federal act. At the time of the enactment of the Wisconsin legislation, it was the intent of the legislature to follow the construction and interpretations of the federal act. Sec. 133.04, Stats., was enacted to further this purpose.

This court has repeatedly held that sec. 133.01, Stats., was intended as a reenactment of the first two sections of the Sherman Antitrust Act, but applicable to intrastate transactions, and with its construction to be governed by the federal decisions which construe the federal law. *State ex rel. Nordell* v. *Kinney,* supra, p. 563. The federal cases lead to the conclusion we reach here.

Under the Sherman Act, the United States Supreme Court held that the civil remedy of treble damages was afforded to a municipality. *Chattanooga Foundry and Pipe Works* v. *Atlanta* (1906), 203 U.S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241.

In *United States* v. *Cooper Corporation* (1941), 312 U.S. 600, 61 Sup. Ct. 742, 85 L. Ed. 1071, the United States Supreme Court held that the United States was not a "person" within the meaning of the Sherman Act and thus could not sue for treble damages. The court noted that, in common usage, the term, "person," does not include the sovereign and that statutes employing the term are ordinarily construed to exclude it. Next, the court viewed the policy underlying the Sherman Act and concluded that the legislative intent was to allow only private parties to sue for treble damages as the federal government had other weapons to combat the evils sought to be avoided and needed no incentive to enforce the Act as did private parties.

In *Georgia* v. *Evans* (1942), 316 U.S. 159, 62 Sup. Ct. 972, 86 L. Ed. 1346, the United States Supreme Court concluded that, under the federal act, a state could avail itself of the treble-damage provision. The language of *Evans* is instructive. Therein, the court stated:

> "Reason balks against implying denial of such a remedy to a State which purchases materials for use in building public highways. Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in section 7 as to exclude a State. Such a construction would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State." (Pp. 162, 163)

Nevertheless, the following year, in *Parker* v. *Brown* (1943), 317 U.S. 341, 63 Sup. Ct. 307, 87 L. Ed. 315, the United States Supreme Court held that a state and its municipalities could not be sued for treble damages under the Sherman Act. We cite that case only for the purpose of pointing out that the right to sue for treble damages and liability to suit are not necessarily reciprocal.

The important conclusion, however, to be drawn from the *Cooper-Evans-Parker* triad is the policy factor of giving general vitality to the purpose of maintaining competition by implementing and construing liberally the treble-damage provision of the antitrust law. The United States Supreme Court apparently, to date, sees no monopoly hazards by combines of municipalities. As we have pointed out earlier, however, such restraints on competition may very well be within the implied purview of antitrust legislation.

The United States Court of Appeals in *State of West Virginia* v. *Chas. Pfizer* (1971, 2d cir.), 440 Fed. 2d 1079, 1087, emphasized the admittedly result orientation with which courts have approached the treble-damage aspects of the antitrust laws. They have, in effect, concluded that, whenever the application of a particular provision is essential to the enforcement of the antitrust laws, the court will infer that the legislature intended that it be extended to

the entity in question even though strict construction of the statutory language, which overlooks the remedial nature of the antitrust law, might lead to the opposite conclusion.

Although, under Wisconsin law, we find express language which places cities and counties in the category of persons eligible to sue for treble damages, we conclude also that the policy of the law leads to the inference that the legislature intended that such governmental entities be allowed to sue as a matter of public policy and in furtherance of the remedial aspects of the antitrust laws.

The defendants argue that another aspect of the Wisconsin law would preclude cities and counties from standing to sue, even if we were to conclude that they were persons under the law. Under sec. 133.01, Stats., the remedy of treble damages is reserved to persons "transacting or doing business in this state."

The defendants contend that such persons are only those engaged in commercial activity with a profit motive. True, profit is not the motive or the purpose of a body politic, but defendants' interpretation is not borne out by reason or precedent. In *Hawaii, supra,* it was held that, under the federal antitrust act, although commercial interests and enterprises are specifically encompassed within the purview of the statute, states and municipalities may nevertheless sue for treble damages, even though they have no concern with the profit motive *per se.* The distinction made in *Hawaii* was between the noncommercial and the commercial capacity of a body politic. The United States Supreme Court held therein that a state may recover treble damages for injuries to its commercial interests as a consumer. As Justice Marshall stated in that case:

> "The legislative history of that provision makes it quite plain that the United States was authorized to recover, not for general injury to the national economy or to the Government's ability to carry out its functions, but only for those injuries suffered in its capacity as a consumer of goods and services." (P. 265)

In that case the court pointed out that neither the United States nor a state could recover for the economic injury to its sovereign interests, but, where Hawaii sued in its proprietary capacity, it was permitted to recover treble damages.

Accordingly, under any rationale, the fact that an enterprise is not undertaken for the profit motive does not mean that commercial or business interests are not at stake. In the instant case, the cities and counties in question are suing, not in their governmental capacities, but in their proprietary and commercial capacities, for statutory damages resulting from the violation of the antitrust statutes.

It is also apparent that the phrase, "transacting or doing business in this state," has another and paramount meaning, and that is simply the jurisdictional qualification that a plaintiff, to invoke the antitrust law of the State of Wisconsin, must have at least minimal contacts with the state in intrastate commerce. There is no evidence that these jurisdictional words were intended to limit the remedy of consumers whose purpose for existence is not profit. No matter how the question of standing is viewed, we conclude that cities and counties may under the Wisconsin act recover treble damages.

The defendants also contend that the plaintiffs have improperly joined several causes of action and, hence, the complaint is demurrable under sec. 263.06(5), Stats.

They also argue that, under sec. 263.04, Stats., the several causes of action were improperly united because they did not "affect all the parties to the action."

We disagree with each of these assertions and hold that the complaint is not demurrable. As we view the complaint, but one cause of action has been asserted; and, accordingly, the question of misjoinder does not arise. The trial court correctly analyzed this contention and concluded that but one cause of action was pleaded, but there was a prayer for different forms of relief—a request for separate remedies under different sections of the statutes.

We stated in *Ewing* v. *General Motors Corp.* (1975), 70 Wis. 2d 962, 966, 236 N.W. 2d 200:

> ". . . the test of whether there is more than one cause of action is '. . . whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication.' "

The court in *Ewing* relied on *Rogers* v. *Oconomowoc* (1962), 16 Wis. 2d 621, 115 N.W. 2d 635, which defined primary right as it is considered in determining the joinder of causes of action:

> "According to this definition, there is only one cause of action if there is only one grouping of facts falling into a single unit or occurrence as a lay person would view them." *Ewing,* p. 967.

Under the terms of the test stated in *Ewing* for a single cause of action, the complaint reveals but one grouping of facts which fall into a single unit, that is, one continuing conspiracy among the defendants made with particular conspirators and contracts made pursuant to the alleged conspiracy. There is but one subject of the controversy—the conspiracy and the contracts growing out of it—and one primary right asserted—the right to be free from the collusive bids on the various contracts.

Whether the conspiracy and the actual execution of the contracts are viewed separately or together, the plaintiffs are obligated to prove the same facts—the conspiracy among the named defendants and the contracts made with the individual plaintiffs pursuant to the conspiracy. The same facts constitute the identical cause of action for which the law gives separate remedies—treble damages and the recovery of contract payments.

In a somewhat similar case, *State* v. *P. Lorillard Co.* (1923), 181 Wis. 347, 193 N.W. 619, this court held that but one cause of action was stated in a civil antitrust complaint brought by the state although the complaint demanded four separate remedies under separate statutes. The complaint sought injunction, the annulment of the defendants' corporate charters, the cancellation of licenses to do business in the state, and a separate forfeiture from each defendant. This court in *Lorillard* said:

> "The delict of the defendants is the conspiracy alleged and their acts in its execution. The primary right and duty of the state and the wrong of the defendants constitute the cause of action, and we regard it as one cause of action, although as incidental to it there may be different forms of relief as against the different defendants." (P. 366)

Admittedly, a plaintiff does not prove its case when it proves a conspiracy. It must also prove that it was damaged by the conspiracy as the result of the affirmative acts of the conspirators. Although both the conspiracy and the wrongful and damaging acts must be proved, where these acts arise out of a continuing conspiracy only one cause of action is alleged. There is no misjoinder of causes of action.

Nor is there a misjoinder of the parties defendant. Sec. 260.11, Stats., is dispositive of such joinder:

> "260.11 Who as defendants. (1) Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. A plaintiff may join as defendants persons against whom the right to relief is alleged to exist in the alternative, although recovery against one may be inconsistent with recovery against the other. . . ."

In the instant case, all of the defendants are jointly liable for treble damages under the claim for relief based on sec. 133.01, Stats., and are properly joined as defendants. Although sec. 133.23, for the contract payments, would only concern the individual liability of particular defendants to particular plaintiffs, this does not affect the propriety of the joinder, for but one cause of action is stated in the complaint.

We are also satisfied that, under sec. 260.10, Stats., the joinder of the parties plaintiff was proper. That section provides in part that, "All persons having an interest in the subject of the action . . . may be joined as plaintiffs."

Sec. 260.12, Stats., provides in part:

> "260.12 Parties united in interest to be joined; class actions; alternative joinder . . . when more than one person makes a separate claim for damage against the same person or persons based upon the same alleged tortious conduct, they may unite in prosecuting their claims in one action."

In the instant case, plaintiffs rest their claim for treble damages and recovery of contract payments on the allegation that each of the defendants participated in the same tortious conduct, the conspiracy. *Ewing, supra,* expressly

permitted the recovery of dissimilar claims because there were common questions of fact that arose out of the same incident, and, accordingly:

> ". . . each individually injured plaintiff has an 'interest' in the subject matter of the other plaintiff's action, and so they should be able to join together." *Ewing,* p. 970.

The plaintiffs were properly joined in the same cause of action, and that cause of action affected all the parties to the action, as required under sec. 263.04, Stats. Even though each defendant is not equally affected under the recoupment of contract payments under sec. 133.23, all of the defendants nevertheless are affected, and that is all that sec. 263.04 requires.

The trial judge correctly decided the question of joinder and, in addition, correctly placed heavy emphasis on the public policy which is to be served by the liberal construction of joinder statutes—that a closely related and unified controversy should be decided in a single lawsuit. He pointed out the havoc to our legal system if closely related actions arising out of a single group of facts are tried in a multiplicity of lawsuits. Under the new rules of civil procedure effective January 1, 1976, which we deem to be merely a codification of present liberal joinder rules, plaintiffs could, without question, join their separate claims for relief against all of these defendants in a single economical suit. See sec. 803.02, Stats., and sec. 803.04, Wisconsin Rules of Civil Procedure, 67 Wis. 2d 642, 646.

The defendants contend that the amended complaint on its face contains allegations which establish that the two-year statute of limitations has run. When the timeliness of bringing a suit is challenged on demurrer, the failure to commence the action in time must appear from the face of the complaint. Sec. 263.06(7), Stats.

> "Objections which do not appear on the face of the plaintiff's declaration or complaint must be taken by plea or answer and not by demurrer even though extrinsic facts are conceded at the hearing." *Estate of Rosenstein* (1970), 47 Wis. 2d 494, 497, 177 N.W. 2d 372.

In examining this complaint, we find that the dates of the contracts, listed in Exhibit A appended to the complaint, nowhere appear in the complaint. All that appears in the complaint is the allegation that the conspiracy existed until at least the year 1969. The complaint does not allege that all of the contracts entered into pursuant to the conspiracy were entered into prior to the termination of the conspiracy. Accordingly, we cannot determine from the face of the complaint when the cause of action accrued and when the applicable period of limitations commenced to run. The trial court correctly stated:

> "Clearly the complaint must unequivocally allege dates in order that the limitations ground of demurrer can be asserted successfully. This complaint does not do so. . . ."

It should also be pointed out that the complaint in paragraphs 17 through 22 alleges that the defendants fraudulently concealed their conspiracy. These paragraphs allege all the facts needed to invoke the doctrine that a defendant who fraudulently conceals a conspiracy is estopped to assert the statute of limitations as a defense. *Boehm* v. *Wheeler* (1974), 65 Wis. 2d 668, 681, 223 N.W. 2d 536.

The defendants argue that they did not in fact fraudulently conceal the conspiracy. This, of course, may be a matter of proof at trial, but by doing so now, they depart from the allegations of the complaint and improperly rely on factual assertions that are extrinsic to the complaint.

Because the plaintiffs here have alleged sufficient facts to invoke the doctrine of estoppel, the complaint is not demurable on the ground of the running of the period of limitations, regardless of what statute of limitations is applicable.

The defendants also argue that, whatever the law might be in regard to limitations where a conspiracy is concealed, under the terms of sec. 133.23, Stats., no recovery of contract payments can be made unless the action is brought within six years of making a contract.

Conceding *arguendo* for the purpose of this discussion that the assertion is correct, the demurrer must be overruled, because it does not appear from the face of the complaint that any statute of limitations has run in respect to the individual contracts. It should be observed, however, that the wrongfulness alleged in respect to the contracts is not that the contracts *per se* were tortious, but that they were tortious as being the product of the conspiracy. Hence, we do not conclude that the statute of limitations on individual contracts is to be divorced from the period of limitations applicable to the allegedly concealed conspiracy. Even were we to assume that the two can be separated, as we said in *A C Storage Co.* v. *Madison Moving & Wrecking Corp.* (1968), 38 Wis. 2d 15, 155 N.W. 2d 567, the remedy of a defendant is not to demur when the contract dates are not alleged, but, initially at least, to move to make more definite and certain.

We do not in this case attempt to determine which statute of limitations would be applicable under the hypothetical situation postulated by the defendants. Their demurrer was addressed to a complaint which failed on its face to show any deficiency in respect to the time the action was brought. Accordingly, the period of limitations is not before us.

The defendants additionally challenge the constitutionality of sec. 133.23, Stats. The defendants argue that the plaintiffs seek the recovery of $6,000,000 worth of contracts. This, they argue, is a severe and oppressive penalty, which is in no way proportionate either to the actual damages sustained by the plaintiffs or the statutory treble damages. They argue that the most that can be permitted is the recovery of actual damages.

The defendants claim that this penalty, the complete disgorgement of a contract price, is shocking, is flagrantly oppressive, and is disproportionate to the offense for which it is imposed.

The plaintiffs appear to concede that a penalty may be unconstitutionally excessive if it is so disproportionate to the offense as to shock public sentiment and contrary to the judgment of reasonable people concerning what is proper under the circumstances. In amplification of this argument, plaintiffs take the position that the unconstitutionality of an allegedly excessive penalty turns upon facts which can only be developed in the course of trial. Until the facts are known, the plaintiffs point out, the court cannot determine either the size of the penalty or the amount of actual damages. The amount claimed as damages is not stated in the complaint.

We agree with the plaintiffs that this court, under the present posture of the case, cannot determine whether the contract penalties assessed will be disproportionate to the actual damages, which must abide the result of trial. We disagree with the defendants' contention that the statute in this respect is on its face unconstitutional. A statutory enactment is presumptively constitutional, and a party challenging the act has the burden of establishing

unconstitutionality beyond a reasonable doubt. *Ortman* v. *Jensen & Johnson, Inc.* (1975), 66 Wis. 2d 508, 521, 225 N.W. 2d 635. The defendants have not sustained that burden at this juncture of the case. Their assertion of unconstitutionality is stated in abstract terms, and we conclude that, as a matter of abstract constitutional law, the provisions of sec. 133.23 are constitutional.

When a penalty is attacked as disproportionate and unreasonable, it is not always to be tested by comparing the loss suffered by the aggrieved parties to the statutory penalties, but by the public interest in enforcing the law and the relation of the penalty to that purpose. *St. Louis Iron Mountain & Southern Ry. Co.* v. *Williams* (1919), 251 U.S. 63, 40 Sup. Ct. 71, 64 L. Ed. 139. In that case the statute regulated the rates for the transportation of railroad passengers. An overcharged passenger under the statute was entitled to a penalty which could be recovered in a civil action. The overcharged passengers were permitted to recover a penalty of over one hundred times their actual damages, together with their suit costs and attorney fees. In upholding this statutory provision, the United States Supreme Court stated:

> "When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." (P. 67)

State v. *Trailer Service, Inc.* (1973), 61 Wis. 2d 400, 212 N.W. 2d 683, referred to the same general principle as that relied upon by the defendants, that a penalty which is so disproportionate to the offense as to shock the public sentiment may be unconstitutional. The court, nevertheless, upheld overload penalties that were not provably related to the damages sustained in the particular overload incident. It relied upon the general public interest in protecting public highways from deterioration by overload of trucks. The court said:

> "To keep the potential threat of enforcement and the desire to obey the law through self-discipline, graduated fines in amounts far exceeding the payload are reasonable means of enforcement; such fines being not only a deterrent to the individual trucker but to the trucking interest generally." (P. 410)

This court has sustained another portion of sec. 133.23, Stats., against the claim of unconstitutionally excessive penalties in *State* v. *Golden Guernsey Dairy Co-operative* (1950), 257 Wis. 254, 43 N.W. 2d 31. In that case, the penalty sought was the revocation of the corporate charter and the denial of the right to do business in Wisconsin. That penalty was upheld, despite the fact that it had no relation to the actual damages caused by the defendant corporations' violation and despite the fact that the imposition of the penalty resulted in the corporate death of the defendants.

Mere severity of the sanctions in antitrust cases does not make them *per se* excessive or disproportionate in a constitutional sense. What is at stake, in the legislature's judgment, is our system of free enterprise and competition. The constitutionality of the penalty is, therefore, to be measured not by actual damages sustained by a private

party, but by the value of the public's interest in enforcing the laws that are designed to preserve our economic system.

Accordingly, we conclude the remedy provided by sec. 133.23, Stats., is not on its face unconstitutional. We do not foreclose these defendants or others from raising the question of oppressive penalties under the particular facts which may be developed in this or in future cases.

The defendants here claim that secs. 133.01 and 133.23, Stats., impose an unconstitutional double penalty. Under sec. 133.01, treble damages may be awarded; and, under sec. 133.23, the injured party may recoup the contract payment and still be able to keep the fruits of the contract. This question is not before us under the facts of a case, for the plaintiffs expressly disclaim any intention of obtaining double recovery, and they acquiesce in the trial judge's statement, "Any recovery for treble damages under Sec. 133.01 can be deducted from recovery of payments under Sec. 133.23."

Accordingly, we decline to resolve this question under the facts of this case. We point out, however, that the reliance of the defendants on *John Mohr & Sons, Inc.* v. *Jahnke* (1972), 55 Wis. 2d 402, 198 N.W. 2d 363, is misplaced. There, the court held that treble damages and common-law punitive damages could not be recovered for the same offense. The court there in effect concluded that the statutory remedy had completely preempted any possible common-law remedy for punitive damages. That ground is not available here, for both treble damages and recoupment of the contract amount are statutory remedies. There is nothing in the statutes to indicate that the remedies are mutually exclusive or are to be offset.

In view of the inadequacy of the briefs on this point, and particularly because the actual question is not raised under the facts of this case, we decline to conclude that the double recovery, if such it be—and apparently mandated by the statute—is unconstitutional.

We suggest, without disposing of the question here, that the recoupment of payments made under the contract is no different than the process that takes place whenever an illegal or fraudulent contract has been entered into and partially or wholly executed. The defrauded party may be entitled to recoupment of the full amount of the contract price, and the malefactor, even though it has given partial or substantial consideration, is, under equitable doctrines, denied the right of setoff. For a general discussion, see Williston, 14 *Contracts* (3d ed.), sec. 1630A ff., p. 15.

There is no doubt, under the circumstances of the usual antitrust case, where full contract payments have been made, that there is an element of double recovery, for in respect to treble damages, the victim of the conspiracy is obligated to prove its monetary injury and its damages are multiplied threefold. In respect to the abrogation of a contract, under the plain meaning of the law, the injured party is entitled to receive not only the excess beyond the market price, which is the starting point under the treble-damages law, but is also entitled to recoup the amount it would have been obligated to pay had not the contract price been fixed as a result of the illegal collusion.

The question is basically similar to that discussed above: Whether the public purpose is served and the intent of the legislation furthered by what are clearly onerous consequences of having participated in an illegal conspiracy in restraint of trade. Under the facts of this case and under the pleadings, we are not obliged to resolve this question.

The trial judge's memorandum decision properly disposed of all the significant issues raised on demurrer. We conclude that cities and counties in Wisconsin have standing to sue for treble damages. There was no improper joinder of causes of action or of parties plaintiff or defendant.

Sec. 133.23, Stats., with respect to recovery of contract payments, is not unconstitutional on its face. We decline to reach those aspects of unconstitutionality that are posed by the defendants, but which are not reachable under the facts before us.

The trial judge properly overruled the defendants' demurrer.

By the Court.—Order affirmed.

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

CITY OF MADISON, et al.,

Plaintiffs,

v.

C. A. HOOPER COMPANY, et al.,

Defendants.

DEMURRER
Case No. 140428

Defendants, Hyland, Hall & Company, George Hall and Clifford Reuschlein, by their attorneys, Geisler & Kay, by Robert J. Kay, separately demur to the second amended complaint of the plaintiff on the following grounds:

1. Each plaintiff has no legal capacity to sue under §133.01, Wis. Stats., in that each plaintiff is not a "person" within the meaning of §133.01, Wis. Stats.

2. Plaintiff, Joint School District #8, has no legal capacity to sue because it is not a legal entity under §120.41(1), Wis. Stats.

3. Causes of action arising under §133.01, Wis. Stats, are improperly united with causes of action arising under §133.23, Wis. Stats., and causes of action under §133.23, Wis Stats., are improperly united against different defendants.

4. There is a misjoinder of parties plaintiff and defendant in that some plaintiffs have separate causes of action against some defendants which may not be joined in the same action with claims of other plaintiffs against other defendants.

5. The second amended complaint does not state facts sufficient to constitute a cause of action under §133.01, Wis. Stats. in that it is not alleged that any plaintiff has sustained any injury to its business for which it may recover damages.

6. The second amended complaint does not state facts sufficient to constitute a cause of action under §133.23, Wis. Stats., in that each plaintiff seeks recovery of payments not alleged to have been received by these defendants nor paid pursuant to contracts entered into by these defendants, and because permitting a plaintiff to recover payments made for services rendered by a defendant would be excessive and would deprive defendants of their property without due process of law by requiring them to provide construction services free of charge.

7. Plaintiffs' claims under §133.01, Wis. Stats., are barred by §893.21, Wis. Stats., and the allegations contained in paragraphs 16 and 17 of the second amended complaint are not sufficient to avoid the aforesaid statute of limitations on the grounds that the tolling of the statute of limitations doctrine alleged in paragraph 16 is not recognized in Wisconsin and the facts alleged in paragraph 17 as estoppel are insufficient to constitute estoppel.

Dated this 6th day of January, 1975.

GEISLER & KAY
/s/ *Robert J. Kay,*
Robert J. Kay, Attorneys for
Defendants, Hyland, Hall &
Company, George Hall and
Clifford Reuschlein

STATE OF WISCONSIN
IN SUPREME COURT

CITY OF MADISON, COUNTY OF DANE and CITY OF MADISON acting as city school district known as JOINT SCHOOL DISTRICT NO. 8 OF THE CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWN OF MADISON, and PARTS OF THE TOWNS OF FITCHBURG, BLOOMING GROVE, BURKE and WESTPORT, DANE COUNTY, WISCONSIN,

Plaintiffs-Respondents,

v.

HYLAND, HALL AND COMPANY, GEORGE HALL and CLIFFORD REUSCHLEIN,

Defendants-Appellants.

Filed September 21, 1976
ROBERT O. UEHLING
CLERK OF SUPREME COURT
MADISON, WISCONSIN

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES
State No

Notice is hereby given that Hyland, Hall and Company, George Hall and Clifford Reuschlein, the appellants above named, hereby appeal to the Supreme Court of the United

States from the final order of the Supreme Court of the State of Wisconsin entered on June 30, 1976, affirming the order of the Circuit Court of Dane County, overruling the appellants' demurrer to the second amended complaint.

This appeal is taken pursuant to United States Code, Title 28, Section 1257(2).

Dated: September 21, 1976.

GEISLER & KAY
/s/ *Robert J. Kay*
Robert J. Kay,
Attorneys for Appellants.

Post Office Address:
433 W. Washington Avenue
Madison, Wisconsin 53703

STATE OF WISCONSIN
IN SUPREME COURT

CITY OF MADISON, COUNTY OF DANE and CITY OF MADISON acting as city school district known as JOINT SCHOOL DISTRICT NO. 8 OF THE CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWN OF MADISON and PARTS OF THE TOWNS OF FITCHBURG, BLOOMING GROVE, BURKE and WESTPORT, DANE COUNTY, WISCONSIN,

Plaintiffs-Respondents,

v.

HYLAND, HALL AND COMPANY, GEORGE HALL and CLIFFORD REUSCHLEIN,

Defendants-Appellants.

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Susan R. Roessel, of lawful age, being first duly sworn on oath deposes and says that she is employed in the offices of Geisler & Kay, 433 W. Washington Avenue, Madison, Wisconsin 53703, attorneys for defendants-appellants, Hyland, Hall and Company, George Hall and Clifford Reuschlein, herein, as secretary.

That on September 21, 1976, she mailed true and correct copies of the notice of appeal to the Supreme Court of the United States on behalf of defendants-appellants, Hy-

land, Hall and Company, George Hall and Clifford Reuschlein, to all parties required to be served, by depositing copies of said notice in the United States Post Office, with first class postage prepaid, addressed to counsel of record at their post office addresses as follows:

Stafford, Rosenbaum, Rieser & Hansen
131 West Wilson Street
Madison, Wisconsin 53703

Bell, Blake & Metzner
222 West Washington Avenue
Madison, Wisconsin 53703

Lawton & Cates
110 East Main Street
Madison, Wisconsin 53703

Wheeler, Van Sickle & Anderson
25 West Main Street
Madison, Wisconsin 53703
and
Walsh, Gerlach & Walsh
131 West Wilson Street
Madison, Wisconsin 53703
/s/ *Susan R. Roessel*
Susan R. Roessel

Subscribed and sworn to before me
this 21st day of September, 1976.
/s/ *Linda S. Hanson*
Linda S. Hanson, Notary Public
State of Wisconsin, County of Dane
My commission expires: 1-8-78.

Supreme Court, U. S.
FILED
OCT 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-440

HYLAND, HALL AND COMPANY, GEORGE HALL and CLIFFORD REUSCHLEIN,
Appellants,

v.

CITY OF MADISON, COUNTY OF DANE, and CITY OF MADISON Acting as City School District Known as JOINT SCHOOL DISTRICT NO. 8 OF THE CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWN OF MADISON AND PARTS OF THE TOWNS OF FITCHBURG, BLOOMING GROVE, BURKE and WESTPORT, DANE COUNTY, WISCONSIN,
Appellees.

On Appeal from the Supreme Court of Wisconsin

MOTION TO DISMISS OR AFFIRM

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INDEX

	Page
I. The State Statute Involved and the Nature of the Case	2
A. The Statute	2
B. The Proceedings Below	2
II. Argument	4
A. The Appeal Is Not Within the Jurisdiction of This Court Because the Decision Appealed Is Not a Final Judgment or Decree Within the Meaning of 28 U.S.C. § 1257	4
B. The Appeal Does Not Present a Substantial Federal Question	6
III. Conclusion	7

TABLE OF AUTHORITIES

Cases Cited

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) ... 5, 6

Pope v. Atlantic Coast Line Railroad Co., 345 U.S. 379 (1953) ... 4

St. Louis, I. Mt. & So. Ry. Co. v. Williams, 251 U.S. 63 (1919) ... 7

Statutes

§ 133.01, Wisconsin Statutes ... 6

§ 133.23, Wisconsin Statutes ... 2, 6, 7

15 U.S.C. § 1 ... 7

28 U.S.C. § 1257 ... 1, 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-440

HYLAND, HALL AND COMPANY, GEORGE HALL and CLIFFORD REUSCHLEIN,
Appellants,

v.

CITY OF MADISON, COUNTY OF DANE, and CITY OF MADISON Acting as City School District Known as JOINT SCHOOL DISTRICT NO. 8 OF THE CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWN OF MADISON AND PARTS OF THE TOWNS OF FITCHBURG, BLOOMING GROVE, BURKE and WESTPORT, DANE COUNTY, WISCONSIN,
Appellees.

On Appeal from the Supreme Court of Wisconsin

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss this appeal or, in the alternative, to affirm the decision of the Supreme Court of Wisconsin on the grounds that (1) the appeal is not within the jurisdiction of this Court because the decision appealed is not a final judgment or decree within the meaning of 28 U.S.C. § 1257, and (2) the appeal does not present a substantial federal question.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. *The Statute.*

The appeal raises the question of whether a provision of the Wisconsin antitrust statute (§ 133.23, Wisconsin Statutes) is unconstitutional on its face. The provision declares void any contract made by a person while a member of a combination or conspiracy in restraint of trade if the contract was founded on, was the result of, grew out of, or was connected with the combination or conspiracy. The provision also allows any payments made on the contract to be recovered. The statute provides that the action to recover payments must be brought within six years after the contract is made.

B. *The Proceedings Below.*

The appellee's second amended complaint alleged a conspiracy to rig bids on public construction contracts. It sought treble damages and (except to the extent that a double recovery might result) recovery of payments made on the contracts. The appellants demurred, in part on the ground that the statutory provision for recovery of payments deprived them of property without due process of law. The trial court overruled the demurrer on all grounds. Jurisdictional Statement, Appendix at pp. 1-13; reported sub nom. *City of Madison v. C. A. Hooper Co.*, 1975-2 CCH Trade Cases ¶ 60,417. The appellants appealed to the Wisconsin Supreme Court. While that appeal was pending, the appellants answered the second amended complaint. The answer denied the allegations and raised various affirmative defenses, including the defense that the statute in question was unconstitutional. The Wisconsin Supreme Court affirmed the order overruling the demurrer. Jurisdictional Statement, Appendix at pp. 14-38; reported, 73 Wis. 2d 364, 243 N.W. 2d 422 (1976). It held that the statutory remedy of recovering payments was not unconstitutional on its face. Jurisdictional Statement, Appendix at pp. 33-36. The Wisconsin Supreme Court expressly said that the appellants could raise the constitutional issue again after the facts were developed at trial. Id. at p. 36. Subsequently, the appellants moved for summary judgment in the trial court. The motion is pending. Discovery is in progress. The case has not yet been scheduled for trial.

II

ARGUMENT

A. *The Appeal Is Not Within the Jurisdiction of This Court Because the Decision Appealed Is Not a Final Judgment or Decree Within the Meaning of 28 U.S.C. § 1257.*

In the decision under appeal, the Wisconsin Supreme Court merely overruled a demurrer. It expressly allowed the appellants to renew their constitutional claim at trial. The decision did not finally decide the case or the constitutional issue raised. It simply held that the Wisconsin Supreme Court would not overturn the statute until it knew the facts.

Under 28 U.S.C. §1257, only "final judgments or decrees" rendered by a state's highest court may be reviewed in this Court. As the Court explained in *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379, 381-382 (1953):

> "Congress has limited our power to review judgments from state courts lest the Court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions. Were our reviewing power not limited to 'final' judgments, litigants would be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation. Ordinarily, then, the overruling of a demurrer, like the issuance of a temporary injunction, is not a 'final' judgment."

In *Pope*, this Court found an exception to the usual rule because the petitioner, once his demurrer was overruled, had no other defense to interpose. "[N]othing remain[ed] to be done but the mechanical entry of judgment by the trial court." 345 U.S. at 382. The unusual situation present in *Pope* is absent

here. The appellants acknowledge that they have a defense on the merits. Jurisdictional Statement, p. 7. In fact, they have asserted many defenses. Among other things, they have denied the alleged conspiracy, invoked the statute of limitations, alleged that they are discharged from liability by settlements with other defendants, and challenged the recovery-of-payments remedy as unconstitutional.

The case may thus be decided—either by summary judgment or by trial—without requiring a decision by this Court on the constitutionality of the statute in question. The appellants ask this Court to render precisely the kind of advisory opinion, in advance of trial, that Congress sought to avoid.

This case also does not fit any of the four categories "in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). First, the federal issue is not conclusive and the outcome of further proceedings is not preordained. See 420 U.S. at 479. Even if recovery of payments were unconstitutional, the appellees would continue to sue for treble damages. Moreover, the appellants acknowledge that they have other defenses. Jurisdictional Statement, p. 7. Second, this is not a case where the federal issue will survive, regardless of the outcome of future state court proceedings. See 420 U.S. at 480. If, for example, the appellants establish the statute of limitations as a defense, the constitutional issue becomes moot. Third, the federal constitutional claim has not been finally decided. See 420 U.S. at 481. It has been deferred until the facts are developed at trial. If the appellees win a judgment for recovery of payments, the constitutional issue can be reviewed in this Court at that time. Fourth, reversal of the Wisconsin Supreme Court would not preclude further litigation on the cause of

action for conspiracy. See 420 U.S. at 483. It would merely limit the appellees' remedy to treble damages.

The appellants claim that this Court has jurisdiction simply because a large judgment might put them out of business. Jurisdictional Statement, pp. 7-8. This prophecy of doom lacks any foundation in the record. Moreover, the appellants ask this Court to assume that both the trial court and the Wisconsin Supreme Court will hold the statute constitutional as applied to the facts—an issue neither court has faced. The facts of the case are not yet before the Wisconsin courts. Adjudication of an abstract constitutional issue in this Court is therefore premature.

B. *The Appeal Does Not Present a Substantial Federal Question.*

The challenged statute (§133.23, Wisconsin Statutes) allows the victim of an antitrust conspiracy to recover payments made on a contract affected by the conspiracy. It prevents the conspirator from keeping the fruits of the unlawful contract. The appellants claim this statute is unconstitutional *on its face*, because it is disproportionate to the offense. In substance, the appellants assert that the penalty is unconstitutionally disproportionate to actual damages. Yet, until the facts are known, neither this Court nor the Wisconsin courts can determine either the size of the penalty or the amount of actual damages. The amount of actual damages is not even alleged in the second amended complaint. A court must measure the crime before it decides whether the punishment fits. Accordingly, a challenge to the statute *on its face* is insubstantial. The constitutional question will become properly framed only when the statute is applied to the facts.

Moreover, the interrelationship between actual damages (under §133.01, Wisconsin Statutes) and recovery of payments

(under §133.23) means that the larger the amount of actual damages, the smaller the amount of payments recovered. As the Wisconsin courts have indicated, actual damages must be found, trebled, and then offset against total payments to determine the amount of payments to be recovered. See Jurisdictional Statement, Appendix at pp. 10-11, 36. If actual damages reach one-third of total contract payments, §133.23 will have no effect at all. The constitutional question will then be moot.

Finally, a penalty is not constitutionally tested by its mere size or even by its proportion to actual damages. Congress has recognized that the substantial penalties are appropriate in antitrust cases by increasing to $1,000,000 the maximum fine which may be imposed on a corporation for a violation of the Sherman Act. See 15 U.S.C. §1. This Court has recognized that the constitutional yardstick is not the actual damages sustained, but rather the public interest in enforcing the law and the relation of the penalty to that purpose. *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63 (1919).

In short, the appellants' constitutional argument rests on unfounded speculation about what facts may turn up at trial. The appeal therefore does not present a substantial federal question.

III

CONCLUSION

The appellees respectfully submit that this Court lacks jurisdiction of the appeal and that the appeal does not present a substantial federal question. For these reasons, the appellees move the Court to dismiss the appeal or, in the alternative, to affirm the decision of the Supreme Court of Wisconsin.

Respectfully submitted,

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